IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8847 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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TOURISM CORPORATION OF GUJARATLTD

Versus

KALU VALJI JETHWA

Appearance:

1. Special Civil Application No. 8847 of 2001

MR NAGESH C SOOD for Petitioner No. 1

MR JT TRIVEDI for Respondent No. 1

MR BJ TRIVEDI for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 03/04/2002

ORAL JUDGEMENT

#. Heard Mr.Nagesh Sood, learned advocate appearing on behalf of the petitioner - Corporation and Mr.J.T.Trevedi, learned advocate for respondent -

workman.

#. In the present petition, the petitioner Corporation has challenged the award passed by the Labour Court, Junagadh in Reference No.57 / 1996, wherein the the labour court has set aside the termination order and granted only fresh employment without granting any backwages and any consequential benefits. Initially, this Court has issued notice and granted interim relief. Thereafter, Rule came to be issued on 19th October, 2001 and interim relief is ordered to be continued.

#. Learned advocate Mr.Sood appearing on behalf of the petitioner Corporation has raised contention that the respondent workman was employed periodically, temporarily and seasonally. According to the period which has been mentioned in the order, by afflux of time, automatically his services came to an end. Therefore, it is not retrenchment and exception made in Section 2[oo][bb] of the I.D.Act, 1947 will apply and therefore, that cannot be considered to be retrenchment and hence, Section 25-F of the I.D.Act is not applicable to the facts of this case. The second contention which has been raised by learned advocate Mr.Sood that dispute has been raised after period of nine years and therefore, Reference itself is bad and hence, the labour court has no jurisdiction to adjudicate such delayed Reference and therefore, the award passed by the labour court is required to be set aside. The third contention raised by learned advocate Mr.Sood that the labour court has not properly appreciated the evidence which was produced by the petitioner Corporation. Learned Advocate Mr.Sood has also submitted that Exh.16 which has been misinterpreted and misread by the labour court because in the statement, working hours has been mentioned, not working days. In support of his contentions, learned advocate Mr.Sood has relied upon Head Note of decision in case of ANIL BAPURAO KANSE V. KRISHNA SAHAKARI SAKHAR KARKHAN LTD AND ANOTHER reported in 1997 [10] SCC 599 which reads as under :-

"Labour Court - Industrial Disputes Act, 1947 Ss.2[oo] and 25-F "Retrenchment" Interpretation of - Seasons worker - An employee engaged in a seasonal work in Chemistry Section of a sugar factory, terminated when the work was over Held, did not amount to retrenchment within the meaning of S.2[oo] though the employee claimed that he had rendered more than 180 days's service S.25-F was therefore not required to be followed. Management however directed to maintain a register for engaging workmen in succeeding

seasons according to seniority Engaing of fresh workmen not to b e resorted to unless workmen of previosu season were engaged Words and Phrases "Retrenchment" - meaning of."

Learned advocate Mr.Sood has also relied on following authorities of the Apex Court as well as this Court.

[1] 1996 [10] SCC 599
[2] 2001 [5] SCC 540
[3] 1997 [6] SCC 650
[4] 2001 [1] SCC 424
[5] 2000 [2] SCC 455
[6] 2001 [5] SCC 540
[7] 1997 [11] SCC 521
[8] 2000 [2] GLR 1793

#. Learned advocate Mr.J.T.Trivedi appearing on behalf of the respondent workman has submitted that the petitioner has not raised contention about Section 2[OO][bb] and Section 25-F of the I.D.Act before the labour court. Learned advocate Mr.Trivedi for respondent workman has submitted that the written statement was filed by the petitioner, wherein no such contention has been raised that periodical appointments given to the workman and it is not retrenchment within meaning of Section 2[OO][bb] of the I.D.Act will apply and therefore, Section 25-F is not required to be complied with. If no such contention was raised before the labour court and the same is raised for the first time before this Court, such contention cannot be accepted and entertained by this Court while exercising the powers under Article 226 and 227 of the Constitution of India. Learned advocate Mr.J.T.Trivedi has also submitted that in written statement, no doubt contention of delay has been raised but before the labour court at the time of making submissions, no such contention has been raised by the petitioner. However, the labour court has considered this aspect in last para-8 of the award that the respondent workman was terminated in December, 1987 and the dispute was raised in the year 1996. Therefore, there was delay of nine years and this delay has not been explained by the respondent workman and therefore, the labour court has rightly considered this aspect and not granted backwages of the interim period, as also, not granted even continuity of service but only granted fresh appointment to the respondent workman with the petitioner Corporation. Therefore, delay aspect has been taken into account while granting relief and therefore the labour court has not committed any error while granting such

relief in favour of the respondent workman. Learned advocate Mr.Trivedi has also submitted that there is nothing on record that periodical appointment orders issued in favour of the respondent workman. No order has been produced by the petitioner Corporation before the labour court and not even before this Court for substantiating their stand that it was periodical appointment and it comes to an end by afflux of time. Therefore, it is submission on behalf of the respondent workman that in absence of the appointment orders as advanced by the petitioner, no such contention can be entertained by this Court. Learned advocate Mr.Trivedi has also submitted that on pg.30 one month order wherefrom it is pointed out by learned advocate Mr.Sood that it is not named in the respondent workman but it is general order to engage one daily wager. Therefore, learned advocate Mr.Trivedi submits that the labor court has rightly considered Exh.16, wherein from March, 1987 to December, 1987 the respondent workman had remained continued in service for period of nine months as Part-time and for the period of two months as daily rated employee and thus, in all continuously working days comes to 264 days and therefore, within period of twelve calender months, the workman has completed 240 days continues service and therefore, the labour court has rightly set aside the termination order and granted only appointment as fresh employee and as such, no error has been committed by the labour court which requires any interference by this Court. Mr.Trivedi, learned advocate has relied one decision of the Apex Court in case of Secretary, HSEB v. Suresh reported in 1999 [3] SCC 601 and read the relevant observations before this Court. In short, Mr.Trivedi submits that this Court while exercising the powers under Article 226 and 227 of the Constitution, unless the findings is otherwise perverse or there exists any apparent error on the face of record. Therefore, Mr.Trivedi further submits that there is no error committed by the labour court while granting relief in favour of the respondent workman and therefore, no interference is required. Lastly, Mr.Trivedi, learned advocate has relied on decision of the Apex Court in case of Ajaib Singh v. The Sirhind Co-op Marketing cum Processing Service Society Ltd reported in AIR 1999 SC 1351 and submits that the Apex Court has observed that Reference of dispute to labour court - provisions of Article 137 of Limitation Act do not apply. In the aforesaid case, the Apex Court has observed that delay of seven years shown to be existing and admitted by the workman, the court can mould relief by refusing backwages or directing payment of part of backwages.

#. I have considered submissions of learned advocates for the parties and also considered the decisions cited before this Court. It is necessary to note one most important aspect before this Court that submissions made by learned advocate Mr.Sood before this Court, were not made before the labour court. The services of the respondent workman were terminated on 18th December, 1987 and the workman raised the dispute after period of nine years and dispute has been raised for adjudication on 16th May, 1996. Before the labour court, statement of claim was filed by the respondent workman vide Exh.3 and written statement was filed by the petitioner vide Exh.4. The respondent workman has submitted application vide Exh.8 with prayer to direct the other side to produce muster roll and pay register for the period from 1985 to 1987. Thereafer,the matter was adjourned. The respondent workman has produced documentary evidence like appointment orders and demand notice sent to the petitioner and rely which has been given by the petitioner, so also the second demand notice which was given by the respondent workman to the petitioner. Thereafter, vide Exh.11 the petitioner has produced documents which was exhibited at Exh.16 statement showing presence of the respondent workman from March, 1987 to December, 1987. Thereafter, the respondent workman was examined vide Exh.17 and vide Exh.19 one witness Prakash Kamdar was examined on behalf of the petitioner. Thereafter, the labour court has examined the matter on the basis of the evidence. The first question was examined by the labour court; whether the respondent was workman within the meaning of Section 2[s] of the I.D.Act, 1947 or not. Though this contention was not raised before the labour court. Ultimately the labour court has come to the conclusion that the respondent is workman within meaning of Section 2[s] of the I.D.Act, 1947. Thereafter, the second question was examined by the labour court whether the respondent workman has continuously worked with the petitioner or not as per Section 25[b] of the I.D.Act, 1947. Thereafter, the labour Court has considered Exh.16 which was produced by the petitioner, wherein working days were mentioned and according to that statement which was not disputed by the petitioner and exhibited before the labour court and the same was produced by the petitioner, on the basis of that statement, the labour court has come to the conclusion that from March, 1987 to December, 1987 the resondent workman has completed 264 days continues service and therefore, it amounts to continues service as provided under Section 25[B] and [F] of the I.D.Act. Thereafter, the third question which was examined by the labour court that whether such termination is retrenchment or not ?

The labour court has considered that Section 25 of the I.D.Act and come to the conclusion that any type of termination, it amounts to retrenchment and therefore such termination is retrenchment. Thereafter, the labour court has examined the question of Section 25-F of the I.D.Act has been violated by the petitioner. However, it is pertinent to note that it was not case that Section 25-F has been complied with by the petitioner. Then the labour court has examined the question of backwages keeping into mind the delay aspect of nine years and ultimately the labour court has not granted any backwages but only granted fresh appointment in service in favour of the respondent workman.

#. It is necessary to note that written statement which has been produced by the petitioner before this Court at pg.22 - Annexure-B. I have gone through written statement but no such contention has been raised by the petitioner that said termination is covered by exception 2[oo][bb] of the I.D.Act and therefore, it does not amount to retrenchment and Section 25-F of the I.D.Act is not applicable. It was only mentioned that periodical appointments were given and he was temporarily appointed and as such, no specific contention raised on the basis of factual aspects that this workman is not entitled any retrenchment compensation because of Section 2[oo][bb] of the I.D.Act, 1947. Thus, no such contention was raised in the written statement. This Court has perused the entire award but no such contention was raised before the labour court. It is further pertinent to note that the respondent workman has produced vide Exh.12 first appointment order of 1985 but the petitioner has not produced any documentary evidence before the labour court to justify the contention of periodical appointments, seasonal appointment and temporary appointment. It is duty of the petitioner to justify the contention by producing necessary evidence before the labour court. Merely oral evidence of the witness is not enough to substantiate the contention by leading documentary evidence. The petitioner has only produced one document which is at Exh.16 and the same is rightly considered by the labour court. Therefore, in absence of the documentary evidence in respect of the periodical appointments, temporary appointment and seasonal appointment and such contention which was not raised before the written statement or not raised before the labour court and for the first time raised before this Court. According to my opinion, such contention cannot be permitted to be allowed to raise, otherwise, it amounts to injustice to the respondent workman. Even the labour court could not give any finding as such

contention was not raised and if such contention is permitted to be raised, the respondent will remain without any opportunity to answer that contention before the labour court, otherwise, the labour court would have considered such contention and the respondent workman would have replied such contention. Therefore, in view of this Court, the petitioner should not be allowed to raise such contention before this Court as the same was not raised in the written statement before the labour court and no such documentary evidence was produced before the labour court. Therefore, in absence of such contention, the petitioner is not permitted to raise such contentions before this Court and accordingly, such contention is rejected.

#. This Court fails to understand that on what basis, learned advocate Mr.Sood has argument this point and cited these many authorities before this Court especially when there is not basis and no stand created before the labour court. So far as the contention that such termination is not retrenchment as provided under Section 2[oo][bb] will apply and Section 25-F is not required to be complied with, for this, it was the duty of the petitioner which is corporate body to produce necessary evidence to justify this contention to prove that this is periodical appointments by number of orders. No such document was produced nor produced any order of season appointment to show that it was temporary appointment. Exh.16 which is shown this Court is the certified copy wherefrom it reflects working of the respondent for the period from March, 1987 to December, 1987. However, it is observed that the contention based on interpretation of this document advanced by learned advocate Mr.Sood is misconceived and baseless. Therefore, this Court has made understood learned advocate Mr.Sood that it is not working hours but in fact, it is working days attended by the respondent workman. Thus, from bare perusal of this document which is an extract of the register, it transpires that the respondent workman has completed 264 days from March, 1987 to December, 1987.

#. In respect of the contention about delay, it is necessary to note that in written statement, this contention has been raised in para-2 except that, nowhere it is mentioned about delay. Merely raising the dispute or contention in the written statement, cannot be considered to be contention unless and until it was raised before the labour court. I have perused the award passed by the labour court, no such contention was raised before the labour court about delay by the petitioner. However, delay aspect has been examined by the Apex Court

in number of cases. The Apex Court has considered the limitation aspect in case of Ajaib Singh v. The Sirhind Co-op Marketing cum Processing Service Society Ltd reported in AIR 1999 SC 1351. The relevant observations made in para-10 & 11 are referred as under :-

"10. It follows, therefore, that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay. The please of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the labour court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the Tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant backwages to the workman till the date he raised the demand regarding his illegal retrenchment / termination or dismissal. The Court may also in appropriate cases direct the payment of pat of the back wages instead of full backwages. Reliance of the learned counsel for the respondent management on the full bench judgment of the Punjab and Haryana High Court in Ram Chander Morya V. State of Haryana [1999] 1 SCT 141 is also of no help to him. In that case the High Court nowhere held that the provisions of Article 137 of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided nor any guidelines to determine as to what shall be the period of limitation in such cases." However, it went on further to say that "reasonable time in the cases of labour for demand of reference or dispute by appropriate Government to labour tribunals will be five years after which the Government can refuse to make a reference on the ground of delay and laches if there is no explanation to the delay". We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an application under Section 37-C of the Act to be adjudicated. It is not the function of the Court to prescribe the limitation where the Legislature in its wisdom had thought it fit not to prescribe any period. The courts admittedly interpret law

and do not make laws. Personal views of the Judges presiding the Court cannot be stretched to authorise them to interpret law in such a manner which would amount to legislation intentionally left over by the Legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purposes of invoking the jurisdiction of the Courts/ boards and tribunal under the Act.

11. In the instant case, the respondent management is not shown to have taken any plea regarding delay as is evident from the issues framed by the labour Court. The only plea raised in defence was that the Labour Court had no jurisdiction to adjudicate the reference and the termination of the services of the workman was justified. Had this plea been raised, the workman would have been in a position to show the circumstances preventing him in approaching the court at an earlier stage or even to satisfy the Court that such a plea was not sustainable after the reference was made by the Government. The learned Judges of the High Court in writ proceedings, even without pleadings were therefore, unjustified. The High Court was also not justified in holding that the Courts were bound to render an even handed justice by keeping balance between the two different parties. Such an approach totally ignores the aims and object and the social object sought to be achieved by the Act. Even after noticing that "it is true that a fight between the workman and the management is not a just between equals," the Court was not justified to make them equals while returning the findings, which if allowed to prevail, would result in frustration of the purpose of the enactment. The workman appears to be justified in complaining that in the absence of any plea on behalf of the management and any evidence, regarding delay, he could not be deprived of the benefits under the Act merely on technicalities of law. The High Court appears to have substituted its opinion of the opinion of the Labour Court which was not permissible in proceedings under Articles 226/227 of the Constitution."

#. Similarly, in case of SAPAN KUMAR PANDIT VS. U.P.STATE ELECTRICITY BOARD AND OTHERS reported in [2001] 6 SCC 222, wherein this Court has examined the question. Relevant observation made in para-8 and 9 are quoted as under :-

"8. The above section is almost in tune with Section 10 of the Industrial Disputes Act, 1947, and the difference between these two provisions does not relate to the points at issue in this case. Though no time limit is fixed for making the reference for a dispute for adjudication, could any State Government revive a dispute which had submerged in stupor by long lapse of time and rekindle by making a reference of it to adjudication? The words "at any time" as used in the section are prima facie indicator to a period without boundary. But such an interpretation making the power unending would be pedantic. There is inherent evidence in this sub-section itself to indicate that the time has some circumscription. The words "where the Government is of opinion that any industrial dispute exists or is apprehended" have to be read in conjuction with the words "at any time". They are, in a way, complementary to each other. The Government's power to refer an industrial dispute for adjudication has thus one limitation of time and that is, it can be done only so long as the dispute exists. In other words, the period envisaged by the enduring expression "at any time" terminates with the eclipse of the industrial dispute. It, therefore, means that if the dispute existed on the day when the reference was made by the Government, it is idle to ascertain the number of years which elapsed since the commencement of the dispute to determine whether the delay would have extinguished the power of the Government to make the reference.

9. Hence the real test is, was the industrial dispute in existence on the date of reference for adjudication ? If the answer is in the negative then the Government's power to make a reference would have extinguished. On the other hand, if the answer is in positive terms the Government could have exercised the power whatever be the range of the period which elapsed since the inception of the dispute. That apart, a decision of the Government in this regard

> cannot be listed [sic] on the possibility of what another party would think, whether any dispute exited or not. The section indicates that if in the opinion of the Government the dispute existed then the Government could make the reference. The only authority which can form such an opinion is the Government. If the Government decides to make the reference, there is a presumption that in the opinion of the Government, there existed such a dispute."

##. In view of above observations made by the Apex Court, so far as contention of delay which has been raised by the petitioner, it is clear answer given by the Apex Court that dispute remains in existence even though there was delay in rasing the dispute and the Tribunal is entitled to adjudicate the dispute even after delay. It is also necessary to note that this contention is raised before this Court though, no doubt, it was stated in the written statement before the labour court but fact remains that the order of Reference has not been challenged by the petitioner before this Court. If the petitioner was in fact aggrieved by making of the Reference on the ground of delay but the petitioner has not challenged the terms of the Reference or the order of Reference before this Court and therefore, according to my opinion, view taken by the Apex Court in above referred two decisions, the labour court is not entitled to go into question of validity of Reference and the labour court cannot examine the legality and validity of the order of Reference. But the labour court has considered the delay aspect at the time of granting relief and the labour court has rightly moulded the relief while not granting the backwage of the interim period, nor granted continuity of service in favour of the respondent workman but only granted benefit of employment as fresh employee and therefore, the labour court has rightly exercised the jurisdiction.

##. In view of above observations, the contention which has been raised by the petitioner about Section 2[oo][bb] and Section 25-F of the I.D.Act and the contention in regard to seasonal and temporary appointment on periodical basis, no such evidence produced before the labour court and no such contention raised before the labour court in written statement as well as no oral arguments led before the labour court. Therefore, according to my opinion, decisions relied upon by learned advocate Mr.Sood on behalf of the petitioners are not applicable to the facts of this case inasmuch as no such contention was raised before the labour court in written

statement nor even during the course of argument and no documentary evidence is produce to substantiate their stand. Therefore, according to my opinion, none of the authority is applicable to the facts of this case and hence, not relied by this Court.

##. However, it is settled position of law that the powers of this Court are very limited while examining the legality and validity of the award passed by the labour court. The view taken by the Apex Court in Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Another reported in 2000 SCC [Labour and Service] pg.471, the Apex Court has held that while exercising the powers under Article 226 and 227 of the Constitution, interference with pure finding of fact and Reappreciation of the evidence is held to be impermissible. The High Court does not exercise appellate jurisdiction under Article 226. Even insufficiency of evidence or that another view is possible, it is held that no ground to interfere with the findings of the Industrial Tribunal. Recently also, the Apex Court has considered this aspect in case of SUGARBAI M. SIDDIQ AND OTHERS V. RAMESH S. HANDKARE reported in 2001 [8] SCC pg.477, the Apex Court has held that scope of powers of High Court is concerned not with the decision of the lower court / tribunal but with its decision-making process. High Court must ascertain whether such Court or tribunal had jurisdiction to deal with a particular matter and whether the order in question is vitiated by procedural irregularity, then only High Court can interfere with, otherwise, not.

##. In view of above observations and discussion, according to my opinion, the labour court has rightly considered each and every aspect of the matter and rightly dealt with all the contentions raised before the labour court and rightly answered the issues while giving cogent reasons in support of its conclusion. The labour court has taken sufficient care while granting the final relief and rightly not granted backwages, according to my opinion, it is very just and reasonable award passed by the labour court and therefore, no error has been committed by the labour court. As such, no jurisdictional error nor any procedural irregularity committed by the labour court and therefore, no interference of this Court is called for under Article 226 / 227 of the Constitution. Therefore, there is no substance in this petition, which is rejected accordingly.

##. Learned advocate Mr.J.T.Trivedi for respondent workman submits that the award has been passed by the

labour court on 24th May, 2001 and ad-interim relief has been granted by tis Court on 3rd October, 2001 and affidavit as required under Section 17-B of the I.D.Act has been filed by the respondent wrokman on 30th October, 2001. It is further submitted that though this Court has passed order on date 19th October, 2001 directing to pay the workman the last drawn wages as required under Section 17-B of the I.D.Act, 1947 but as per submissions of learned advocate Mr.Trivedi, till date, no such payment has been made to the respondent workman though affidavit as required is filed before the respondent workman and a copy there of has been served on the petitioner. In light of this situation, Mr.Trivedi requests that some suitable direction may be issued to the petitioner Corporation so that the award in question which is now upheld by this Court can be implemented in letter and spirit within some reasonable time and to pay full wages to the respondent workman from the date of award. Considering submissions made on behalf of the respondent workman by Mr.Trivedi, it is directed to the petitioner to appoint the respondent workman as fresh employee as per the direction issued by the labour court within period of one month from the date of receiving a copy of this order. It is further directed to the petitioner Corporation to pay full current wages to the respondent workman with effect from 24th May, 2001 till the date of actual reinstatement within period of two months from the date of receipt of copy of this order.

Rule discharged. Ad-interim relief, if any, stands vacated. No order as to costs.

Direct Service is permitted to respondent.

Date : 3-4-2002 [H.K.Rathod, J.]

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